

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

74-1220

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-v-

RALPH LOMBARDO,

Defendant-Appellant,

and

VINCENT ALOI, JOHN DIOGUARDI
and JOHN SAVINO,

Defendants.
-----X

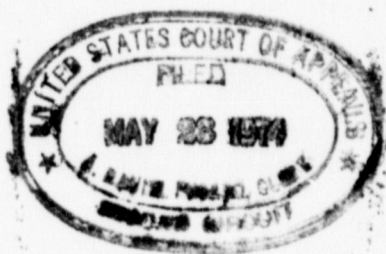
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SUPPLEMENTAL APPENDIX FOR APPELLANT RALPH LOMBARDO

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Count 38 of 73 Cr. 699

COUNT THIRTY-EIGHT

The Grand Jury further charges:

1. From on or about the 1st day of January, 1970 up to and including the 5th day of August, 1970, in the Southern District of New York, the defendant RALPH LOMBARDO, unlawfully, wilfully and knowingly did make an extortionate extension of credit, to wit, the making and renewal of a loan in the amount of \$10,000 to Michael Hellerman at the rate of interest \$125 per week.

2. From on or about the 1st day of January 1970, up to and including the 5th day of August 1970, in the Southern District of New York SEBASTIAN ALOI, a/k/a "Buster Aloï" and JOHN DIOGUARDI, a/k/a "Johnny Dio," the defendants, unlawfully, wilfully and knowingly did aid, abet, counsel, induce and procure the commission of the crime in paragraph 1 above.

(Title 18, United States Code, Sections 892 and 2)

Memorandum and Order Severing
Count 38 and Deleting All References
to Aliases and Nicknames
July 17, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA, :

- v - :

VINCENT ALOI, et al., :

Defendants. :

MEMORANDUM AND
ORDER

73 Cr. 362

-----x

KNAPP, D.J.

Defendants Dioguardi, Fusco, and Savino move for various types of severance and for certain other relief. The motions are granted to the extent indicated in the following memorandum.

Defendants' motion, pursuant to Fed. R. Crim. P. 8, to have Counts 37 and 38 severed upon the ground of misjoinder is granted. The government contends that joinder of the perjury count against defendant Miller and of the extortionate credit transaction count against defendant Lombardo is proper since these two counts against these two defendants respectively arose from "the same series of acts and transactions constituting an offense or offenses" underlying the remainder of the indictment, i.e., the alleged scheme involving the fraudulent public offering of At Your Service Leasing stock. The government argues that the evidence on the perjury count would be admissible against Miller in the trial even if the perjury count were omitted altogether,

and that the government would be entitled in its direct case to offer Miller's false exculpatory statements (alleged to be perjurious) since they have a bearing on the transaction involved in the conspiracy count. Further, the government argues that in order to prove the securities fraud it will necessarily have to prove the extortionate credit transaction against defendant Lombardo.

The government has cited various authority suggesting that such joinder is not improper. See, e.g., United States v. Sweig (S.D. N.Y. 1970), 316 F.Supp. 1148, 1158. However, although the moving defendants have not presented a strong showing of possible prejudice that would result to them if the two counts in question were not severed, it seems to this court that, regardless of whether the evidence on these two counts is relevant to the main charge of stock manipulation, an attempt to concentrate the jury's attention on two separate events admittedly outside the alleged conspiracy would in this case be confusing. The government's claim of prejudice through the deletion of Count 38 - that the jury might "wonder" why no charge of extortionate extension of credit was included in the indictment - seems far fetched.

Defendants Fusco and Savino also move to have Counts 9, 12, and 19 severed from the indictment. While the moving defendants were not charged in these three counts of the indictment, such joinder is permissible under Rule 8 since the three counts in question arose from "the same series of acts" as the remaining counts. The defendants

have not demonstrated that joinder of these counts would be prejudicial, and the motion is denied.

Defendants Fusco and Savino further move (1) for disclosure to counsel or inspection by the Court of all proceedings before the Grand Jury in connection with the charges against them, (2) for dismissal of the indictment, and (3) for a severance from all other co-defendants for the purposes of trial. Having considered these motions, the Court finds them without merit, and they are denied.

Defendants Dioguardi, Fusco and Savino move to strike the aliases from the caption and body of the indictment. The government claims that the use of aliases in the indictment would facilitate the jury's understanding of the testimony of certain witnesses who may refer to the defendants' nicknames. It appears to this Court, however, that use of the aliases could unduly prejudice the three defendants in question. United States v. Grayson (2d Cir. 1948) 166 F.2d 863, 867. Accordingly, it is ordered that all references to "Buster" Aloï, "Johnny Dio," and "Checko Brown" be deleted from the indictment. This is without prejudice, however, to the government's right to mention in its opening statement the fact that some or all of the witnesses will refer to these particular defendants by nicknames, or that any defendant was known to any or all witnesses by any name other than his own.

Defendant Dioguardi's motion to strike paragraph 10, page 3, of the indictment and to "prune" the indictment is granted to the extent

that paragraph 10, page 3, of the indictment is stricken. The Court also orders that paragraphs 12 and 14 on page 4 be stricken. The government may, at its option, also strike paragraphs 11 and 13 on page 4.

SO ORDERED.

Dated: New York, New York
July 17, 1973.

WHITMAN KNAPP, U.S.D.J.

Memorandum and Order
Adhering to Prior Order
October 16, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA, :

Plaintiff, :

-against- :

VINCENT ALOI, et al., :

Defendants. :

MEMORANDUM AND ORDER

73 Cr. 699

-----x

KNAPP, D.J.

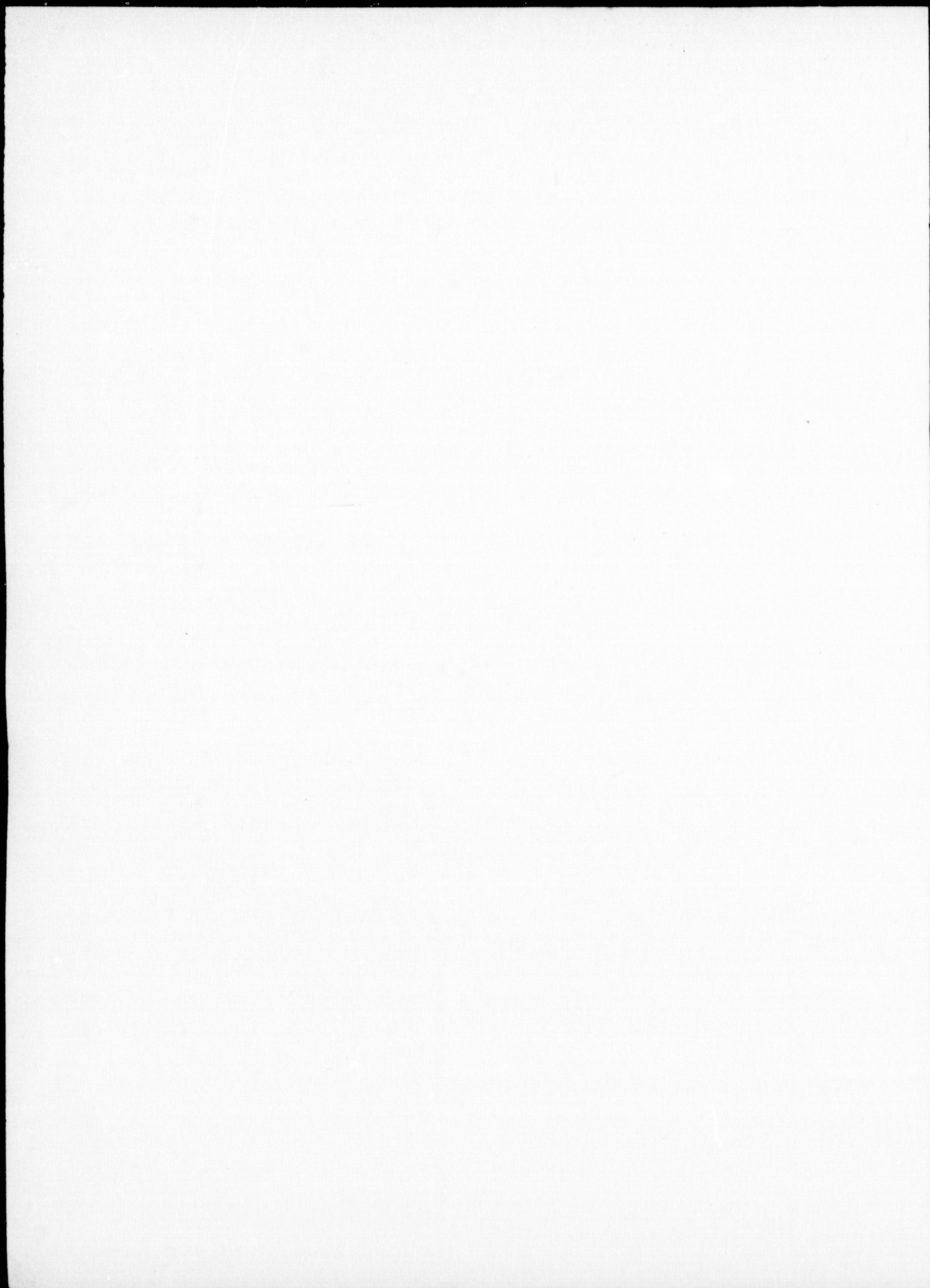
On July 17, 1973, this Court entered a Memorandum and Order dealing with various aspects of indictment 73 Cr. 362. Two days later (the draftsman not having been advised of the Court's decision), a superseding indictment, 73 Cr. 699, was filed which did not take into account the Court's Memorandum. Accordingly, the Court now rules on three questions involving the superseding indictment.

In its July 17th Memorandum, the Court granted the motion of defendants Dioguardi, Fusco, and Savino to have Count 38, charging the defendants Lombardo, Dioguardi, and Sebastian Aloï with an extortionate credit transaction, severed from the indictment; the Court stated that: "although the moving defendants have not presented a strong showing of possible prejudice that would result to them if the [count] in question were not severed, it seems to this court that, re-

gardless of whether the evidence on [this] count is relevant to the main charge of stock manipulation, an attempt to concentrate the jury's attention on [a] separate [event] admittedly outside the alleged conspiracy would in this case be confusing." In reply the government now contends that the fact of the loan in question is relevant because it shows "one of Lombardo's motives in participating in the fraudulent AYSL offer," "the context of Hellerman's participation and, more importantly, the ultimate disposition of proceeds Hellerman received." The government argues that, since the existence of the loan will be proven as part of the government's direct case in any event, Count 38 should remain. The Court is inclined to feel, however, that its original decision should stand, and that Count 38 should be severed.

On the issue of aliases, the Court orders that all references to "Buster" Aloï, "Johnny Dio," and "Checko Brown" be deleted from the superseding indictment, but under the same conditions provided in the Court's earlier Memorandum, namely without prejudice "to the government's right to mention in its opening statement the fact that some or all of the witnesses will refer to these particular defendants by nicknames, or that any defendant was known to any or all witnesses by any name other than his own."

Paragraphs 12, 13, 14, and 15 of the superseding indictment are allowed to stand. Although the draftsman was not addressing himself to the judicial criticism contained in the Court's Memorandum,

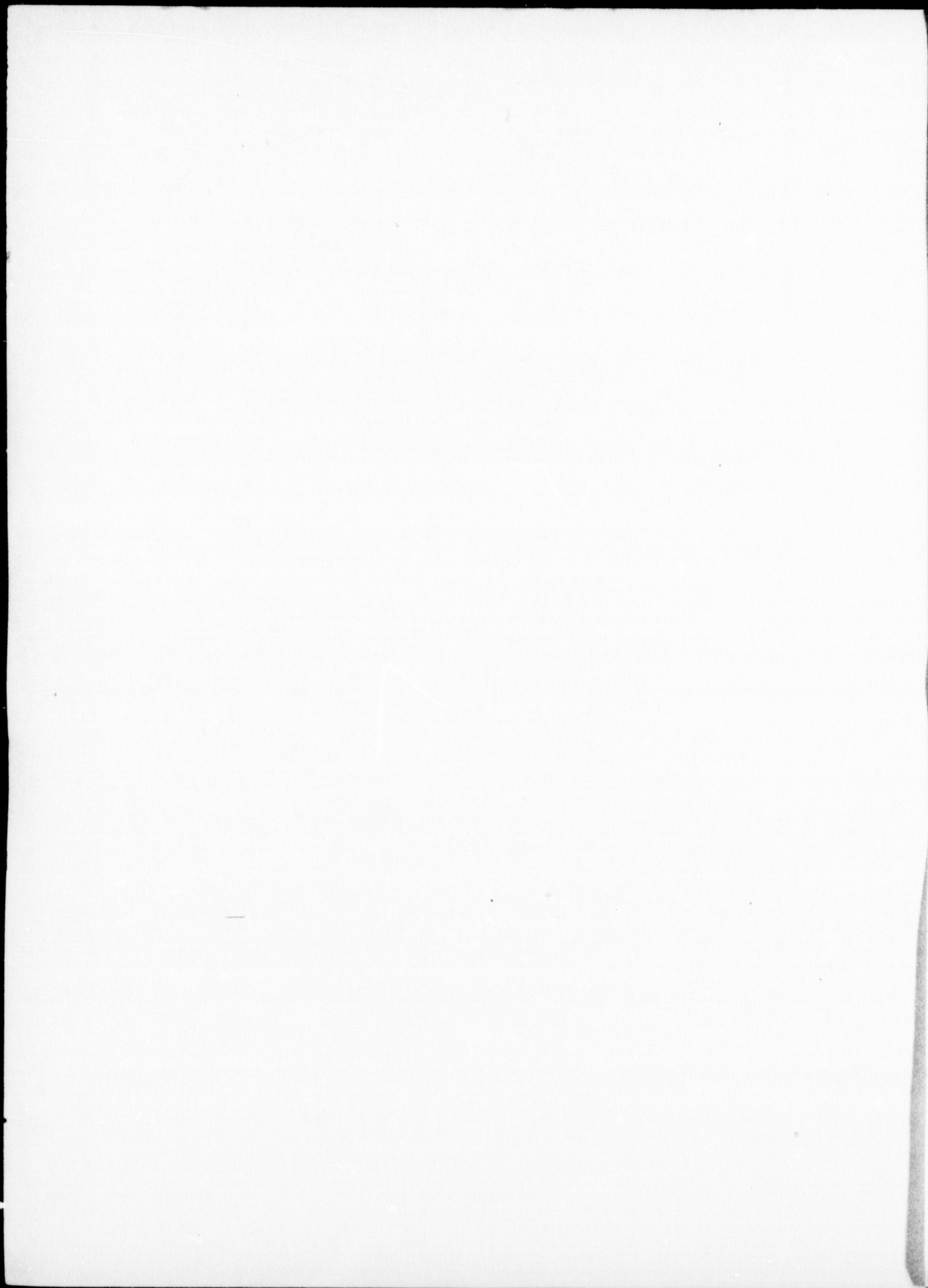


the change from "was the superior to" to "reported to" seems to remove the innuendo of which the defendants complained.

SO ORDERED

Dated: New York, New York
October 16, 1973

WHITMAN KNAPP, U.S.D.J.



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